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In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1473 and 75-1705

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners (and Cross-Respondents),

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent (and Cross-Petitioner).

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)

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BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)[1]

Opinions Below

The decision of the court of appeals (*"du Pont II"*; App. 253; [2] Pet. in No. 75-1473, Appendix A) was the second opinion

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[1] Petitioners in No. 75-1473 and Cross-Respondents in No. 75-1705 are E. I. du Pont de Nemours and Company, Olin Corporation, FMC Corporation, American Cyanamid Company, Monsanto Company, The Dow Chemical Company, Allied Chemical Corporation, Hercules Incorporated, Union Carbide Corporation, Stauffer Chemical Company, Diamond Shamrock Corporation, PPG Industries, Incorporated, BASF Wyandotte Corporation, Cities Service Company, and N L Industries, Incorporated.

[2] This brief complements the brief being filed concurrently in No. 75-978, the companion case in this Court relating to the first decision by the court of appeals in the consolidated proceedings in that court.

Throughout this brief, as in the brief being filed simultaneously in No. 75-978, citations will be to the Single Appendix in No. 75-978 and will be designated "App. ___." An exhibit volume of the Appendix has also been prepared, comprising a reproduction of two lengthy EPA-issued documents which are part of the administrative record in this case. This exhibit volume will be cited as "Ex. R. ___." In addition, in this brief citation will be made

by that court in a consolidated proceeding. It has not yet been officially reported. It is unofficially reported at 8 E.R.C. 1718.

The first opinion of the court of appeals in the consolidated proceeding (*"du Pont I"*; App. 240; Pet. in No. 75-978, Appendix A) is reported at 528 F.2d 1136.

Jurisdiction

The judgment of the court of appeals in its second decision (App. 287-289; Pet. in No. 75-1473, Appendix A at 35a–37a) was entered on March 10, 1976. The petition for writ of certiorari in No. 75-1473 respecting the decision was filed on April 13, 1976. The cross-petition for writ of certiorari (No. 75-1705) was filed on May 24, 1976. Both the petition numbered 75-1473 and the cross-petition numbered 75-1705 were granted by this Court on June 21, 1976.

Also on June 21, 1976, this Court denied petitioners' motion to consolidate the cases numbered 75-1473 and 75-1705 with No. 75-978. The petition for writ of certiorari in No. 75-978 had been granted on April 19, 1976. The Court did consolidate Nos. 75-1473 and 75-1705, and ordered the combined cases to be argued "in tandem with No. 75-978."

Petitioners are filing this brief simultaneously with the filing of the opening brief in the companion case, No. 75-978.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented[3]

1. Whether the Federal Water Pollution Control Act, as amended, provides that regulations governing wastewater

to certain portions of the original record on file with the Court which have not been reproduced in the Appendix. Where those portions of the record stem from the certified index of the administrative record filed by EPA with the court of appeals, the citation will appear as "R. ___." Such citations will reflect EPA's original pagination of the administrative record. A complete copy of the administrative record is on file with the Clerk of this Court.

[3] Questions 1, 2, and 3 are also presented to this Court in No. 75-978. Question 4 was added by the cross-petition, No. 75-1705.

effluent discharges from existing plants be issued in the form of

(a) "effluent limitations" based upon an authorization said to be implied from Section 301(b) of the Act, or

(b) "guidelines for effluent limitations" in compliance with the express command of Section 304(b) of the Act.

2. Whether district courts or courts of appeals have initial jurisdiction to review regulations issued by the Administrator of the Environmental Protection Agency under the Federal Water Pollution Control Act, as amended, governing wastewater effluent discharges from existing plants.

3. Whether when "the Act is not clear" in conferring initial jurisdiction to review regulations for existing plants upon the courts of appeals rather than in providing the normal review in the district courts, the statute should be construed on grounds of practicality to confer such initial jurisdiction on the courts of appeals.

4. Whether standards of performance promulgated under Section 306 of the Act to control effluent discharges from sources constructed after the publication of proposed standards ("new sources") are "presumptively applicable" to rather than always binding on such sources, such that the Agency must provide a "safety valve procedure" enabling individual new sources to obtain a variance from the standards upon a proper factual showing.[4]

Statutes And Regulations Involved

1. *The Federal Water Pollution Control Act, as amended.* Sections 101, 301, 302, 304, 306, 307, 309, 401, 402, 502, 505 and 509 of the Act (33 U.S.C. §§ 1251, 1311, 1312, 1314, 1316, 1317, 1319, 1341, 1342, 1362, 1365 and 1369) are set forth in

[4] The reference to a "safety valve procedure" is taken from *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1968). The court of appeals in the present case used the term "escape mechanism". (App. 263.)

Appendix A to the opening brief in the companion case, No. 75-978. (The Appendices are separately bound.)

2. *"Effluent Limitations Guidelines" and "Standards Of Performance For New Sources" for the Inorganic Chemicals Manufacturing Point Source Category.* The regulations issued by the Administrator which govern the wastewater effluent discharges from existing plants and from new sources in the Inorganic Chemicals Manufacturing Point Source Category are found at 40 C.F.R. Part 415, *added by* 39 *Fed. Reg.* 9611-9635 (March 12, 1974). They are set forth in Appendix B to the opening brief in No. 75-978.

3. *"Effluent Guidelines and Standards—General Provisions."* The regulations issued by the Administrator to provide general provisions applicable to effluent guidelines for existing sources and to standards of performance for new sources for the various industry categories including the inorganic chemicals category are found at 40 C.F.R. Part 401, *added by* 39 *Fed. Reg.* 4531-4533 (February 4, 1974). They are set forth in Appendix C to the opening brief in No. 75-978.

Statement Of The Case

Case No. 75-1473 raises issues identical to those posed in No. 75-978, but on a different jurisdictional base than that of No. 75-978. Each case concerns the Environmental Protection Agency's regulations for wastewater effluents from existing facilities in the inorganic chemicals industry. They present issues of the proper construction to be accorded key sections of the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. §§ 1251 *et seq.*

The divergent jurisdictional postures of the cases arise because the pending issues of statutory construction involving the effluent regulations for existing plants bear on the special provisions in the Act prescribing jurisdiction in the courts of appeals for review of certain regulatory actions of the Administrator of the Environmental Protection Agency ("EPA" or "Administrator" or "the Agency").

Notwithstanding the presence of jurisdictional issues, the heart of the cases consists of the substantive issues of the proper construction to be accorded the statutory provisions governing EPA's issuance of effluent guideline regulations. Because these related cases reflect the two alternative jurisdictional predicates, there is no bar or impediment to the Court's consideration of the substantive statutory-construction issues.

No such jurisdictional issue arises in conjunction with the question of statutory construction respecting the new source standards presented in No. 75-1705.

The opening brief in the companion case, No. 75-978, contains a comprehensive discussion of the statutory framework, of the administrative proceedings which culminated in EPA's promulgation of the regulations at issue here, and of the prior judicial proceedings in these cases. See Opening Brief in No. 75-978, at 4-25.

This brief will discuss the questions presented in a different order than that set out *supra*. The discussion in this brief will open with, and will focus on, the issue presented by the cross-petition (No. 75-1705) relating to EPA's new-source standards. Petitioner's arguments respecting EPA's regulations for existing plants will then be briefly noted but not discussed in detail because the questions presented are identical to those in No. 75-978 and are discussed comprehensively in the companion opening brief in No. 75-978.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT EPA'S NEW SOURCE STANDARDS SHOULD CONTAIN A "SAFETY VALVE"

The court of appeals correctly ruled that EPA's new source standards should contain a "safety valve procedure" enabling a new source to obtain, upon an appropriate factual showing, a discharge permit different from such a standard. (App. 263.) Provisions of the Act, as well as judicial doctrines of construction for statutes providing agencies with rulemaking authority,

support a "safety valve procedure" linked to special facts in particular cases.

A. Provisions Of The Act Support A "Safety Valve Procedure"

The Act's provisions direct that EPA promulgate regulations for existing plants in the form of "guidelines" which by their very nature should contain mechanisms for providing a flexible application of those regulations to the diverse situations at existing plants. As discussed in the opening brief in No. 75-978, EPA should issue guideline regulations with a range of effluent values and with specified factors to guide the selection of a number from the range for a particular plant. Thus, there is no need for a special "safety valve procedure" in EPA's guideline regulations for existing plants. Section 306 does not, however, call for such flexible guideline regulations. It requires EPA to issue "Federal standards of performance for new sources", not guidelines. (§ 306(b)(1)(B), 33 U.S.C. § 1316 (b)(1)(B).)[5] Consequently, as the court of appeals ruled, to accord with the statutory scheme governing discharge permits for new sources, a safety valve procedure must be recognized and built into the standards.

EPA's new source standards must reflect a generally defined level of wastewater control technology, *i.e.*,

> "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including where practicable, a standard permitting no discharge of pollutants."
>
> (§ 306(a)(1).)

[5] EPA as a result has a greater degree of control over State permit authorities where new plants are involved. The statutory system is roughly comparable to that found in the Clean Air Act, as amended, and described in *Hancock* v. *Train*, ___U.S.___, 44 U.S.L.W. 4767, 4768 n.6 (U.S., June 7, 1976), as follows: "The range of a State's initiative in meeting its primary responsibility to assure air quality is somewhat greater for existing sources of air pollution, such as those involved in this case, than for 'new sources'."

The Administrator was charged with issuing new source standards at least for each of 27 general industry categories listed in Section 306(b)(1)(A), and with doing so by one year and seven months from enactment of the 1972 Amendments. In setting the standards, EPA may "distinguish among classes, types, and sizes" within the 27 general categories. The statute directs the Agency to take into consideration three factors in issuing the standards: (1) the cost of achieving the effluent reduction, (2) non-water quality environmental impacts, and (3) energy requirements. (§ 306(b)(1)(B).) The standards are applicable only to "new sources", specifically defined as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source." (§ 306(a)(2).)[6] Section 306(b)(1)(B) provides that the Administrator shall revise the new source standards "from time to time." The legislative history suggests that Congress believed new sources could attain discharge levels more easily and at less cost than existing plants already in place which must be retrofitted with wastewater control technology. See H. Rep. No. 92-911, 92d Cong., 2d Sess., at 110 (1972), 1 Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 797 (1973) (hereinafter "*Leg. Hist.*").[7]

[6] Under Section 306(d) certain newly constructed facilities will have a ten-year period during which effluent requirements may not be changed:

> "[A]ny point source [not just a new source] the construction of which is commenced after the date of enactment of the [1972 Amendments] . . . and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction. . . ."

Notably, Section 306(d) applies to all newly constructed facilities, not just those which are "new sources" within the meaning of the Act. And, to obtain the ten-year certainty period, the newly-constructed facility must comply with "*all* applicable standards of performance" (emphasis added). For any given new plant, there may be no applicable new source standard, or alternatively, there may be several applicable new source standards if the plant is designed to produce multiple products.

[7] The Conference Committee deleted a provision which would have extended the application of new source standards to cover a modification of an existing source. See S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 127 (1972) (Conference Report), 1 *Leg. Hist.* at 310.

Section 306(e) provides that it is unlawful for a new source to be operated in violation of a new source standard. Direct enforcement of the new source standards is possible outside the permit context. Under Section 309, EPA may bring direct enforcement actions for a violation of a new source standard, and under Section 505 citizens similarly may bring private civil actions to enjoin such violations. (See § 505(a), (b) (exception clause before the last sentence), and (f)(3).) There are no provisions for direct enforcement of the guideline regulations comparable to Sections 306(e), 309, and 505 respecting the new source standards.

Under the Act, however, new source standards are not always to be applied by rote. The statutory provisions pertaining to permits contemplate exceptions, by providing that permit proceedings may result in limitations in a permit for a new source which are different from (either more or less stringent) and which override the new source standard. Section 402(k) does not leave this possibility to inference. It explicitly provides that compliance with a permit "shall be deemed compliance, for purposes of sections 309 and 505, with sections . . . 306 . . . [etc.]." (§ 402(k), 33 U.S.C. § 1342(k).) A "safety valve procedure" in the standards thus simply would recognize the effect of Section 402(k)[8] and would provide a specified means for establishing limitations in permits for new sources which are different from the new source standards themselves.

Congress was able to provide for limitations in permits which overrode the new source standards because a full factual inquiry into the new source's circumstances will be made in the permit proceedings. In issuing permits for new sources, EPA arguably is not exempted from a duty to comply with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). Accordingly, in conjunction with permit proceedings for new sources EPA may be required to

[8] In addition, the specific direction to the Administrator in Section 306(b)(2) to consider the type of process employed and whether it be continuous or batch is a recognition that single-number standards without deviation were not contemplated since batch processing is inherently more variable than continuous processing.

prepare an environmental impact statement under Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C).[9] In any event, the permit proceedings will include an environmental inquiry and assessment. The permit proceedings for new sources thus can provide a good factual basis for adjusting a new source standard to obtain particular limitations for an individual plant.

B. Judicial Doctrines Of Construction For Statutes Authorizing Agency Rules Call For Use Of "Safety Valves" Linked To Special Facts In Particular Cases

A "safety valve procedure" is a customary concomitant to agency rules of general application. Well established judicial doctrines of construction call for use of "safety valves" linked to special facts in particular cases, where statutes provide agencies with authority to establish such rules of general applicability. *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1968). See also *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972). The present case is not the extraordinary situation where there can be no safety valve and the general rule must inevitably and irrevocably be applied by rote. To the contrary, as just discussed, the Act itself contemplates that limitations different from a new source standard may be set in permit proceedings.

C. The Court Of Appeals Took Proper Account Of The Statutory Scheme In Instructing EPA To Establish "Presumptively Applicable" New Source Standards Containing A Safety Valve Procedure

The court of appeals concluded that EPA's new source standards were "presumptively applicable" to rather than always binding on such sources, such that the Agency must provide a

[9] See § 511(c)(1), 33 U.S.C. § 1371(c)(1); see also the opening brief in No. 75-978 at 8 & n.11.

NEPA applies only to "Federal action." See, *e.g.*, 42 U.S.C. § 4332(2)(C); *Flint Ridge Development Co.* v. *The Scenic Rivers Ass'n of Oklahoma*, ___ U.S ___, 44 U.S.L.W. 4954 (U.S. June 24, 1976). Accordingly, if a State has NPDES permit authority, it is not subject to NEPA. State law would determine whether or not a State permit-issuing authority would prepare a special environmental assessment or impact statement in conjunction with

safety valve procedure enabling individual new sources to obtain limitations in permits different from the standards upon a proper factual showing. (App. 263.) This formulation by the court of appeals accords precisely with the statutory scheme.

Where a new source does not have a permit, the Act contemplates that the new source standard will be applicable directly to the source. (See §§ 306(e), 309, and 505.) Necessarily then, a standard must be "presumptively applicable" to provide for the possibility of direct enforcement where there is no permit.

Also, a "presumptively applicable" standard provides an appropriate starting point for permit proceedings. The permit proceedings for new sources, conducted in conjunction with an environmental review and assessment, provide a good basis for examining the factual circumstances at the particular plant or facility involved. Given the starting point provided by the standard, and coupled with the opportunity for a detailed factual inquiry provided by the proceedings and the NEPA review, limitations in the new source's discharge permit can be developed which fit the new source's particular situation. Pursuant to Section 402(k), these limitations in the new source's permit override for enforcement purposes and otherwise supplant the new source standards themselves, for the particular new source. Thus, a "safety valve" clause in the new source standards, linked to special facts in particular cases, is required to carry out the statutory scheme.[10]

In sum, the court of appeals was correct in its holding that EPA had not followed the statute in asserting that its new

action on an application for a new source discharge. In acting on the permit application, a State permit-issuing authority would in any event conduct proceedings which would provide public notice and an opportunity to be heard on the application itself.

[10] Permit-issuing authorities in the States otherwise may believe themselves bound to follow and apply an applicable new source standard no matter how absurd the result may be in a particular case. Also, EPA thus far has not acknowledged even the possibility that under the Act its new source standards may be modified in the sense that permit proceedings may provide a basis in fact for establishing different limitations in a permit.

source standards had to be applied by rote in permit proceedings. Because of the interplay of the enforcement sections (§§ 306(e), 309, and 505) with Section 402(k), the Act provides that in the absence of a permit a new source standard is applicable and enforceable directly. However, permit proceedings can produce limitations for a new source which are different from an otherwise applicable new source standard, if a factual predicate for the different limitations is established.[11] The permit proceedings may be conducted either by State or by Federal permit authorities, depending upon whether the pertinent State has an approved permit program.

II. SECTION 304(b) OF THE ACT MANDATES THAT EPA ISSUE ITS EFFLUENT REGULATIONS FOR EXISTING PLANTS AS "GUIDELINES FOR EFFLUENT LIMITATIONS", SUCH THAT THESE GUIDELINE REGULATIONS MAY BE USED BY PERMIT AUTHORITIES TO ESTABLISH LIMITATIONS IN PERMITS FOR PARTICULAR PLANTS

As discussed in the opening brief in No. 75-978, under the statute EPA is obliged to issue effluent regulations for existing plants in the form of "guidelines for effluent limitations" under Section 304(b) of the Act, 33 U.S.C. § 1314(b). The statute further expressly specifies that these regulations are to be "two pronged", *i.e.*, they must "identify . . . the degree of effluent reduction attainable . . . and . . . specify factors to be taken into account in determining the control measures and practices to be applicable to point sources [individual plants or facilities]. . . ." (§ 304(b)(1).) EPA's regulations for existing plants do not comply with this mandate.

[11] One factual example of the need for a safety valve is provided by the record in the present case. EPA included in certain new source standards (*e.g.*, 40 C.F.R. § 415.95, Appendix B to the opening brief in No. 75-978, at 49b) a provision forbidding overflow from ponds except in a 25-year catastrophic rain event, which the court below correctly held required an infinitely expanding pond in an area of net rainfall. See the brief in No. 75-978, at 70. The permit process must be able to account for such different climatalogical situations at various new plants.

EPA elected to abandon Section 304(b) and has promulgated its existing-plant regulations in the form of single-number "limitations". The Agency asserts that such limitations must be "mechanically cranked" into discharge permits issued for all pertinent plants, despite the diversity of such plants. EPA's regulatory action has made it impossible for permit authorities in qualified States and in its own regional offices to administer a meaningful program for establishing and issuing discharge permits for existing plants, as Congress intended.

For a detailed discussion of these issues, the Court's attention is respectfully drawn to the opening brief in No. 75-978, at 30-85.

III. ORDINARILY, DISTRICT COURTS WOULD HAVE INITIAL JURISDICTION TO REVIEW EPA'S GUIDELINE REGULATIONS FOR EXISTING PLANTS, BUT THIS COURT SHOULD CONSTRUE THE ACT TO ALLOW COURTS OF APPEALS TO TAKE PENDENT JURISDICTION TO REVIEW GUIDELINE REGULATIONS WHERE THE PARTIES SEEK REVIEW OF CONCURRENTLY ISSUED NEW SOURCE STANDARDS

For the reasons stated in the opening brief in No. 75-978, at 94-96, Petitioners urge that this Court construe the Act to allow courts of appeals to take pendent jurisdiction to review guideline regulations where the petitioning parties seek review of new source standards issued concurrently in the same proceeding and on the same record.

Conclusion

This Court should affirm that portion of the court of appeals' decision in *du Pont II* which ruled that EPA's new source standards must contain a "safety valve procedure".

EPA's effluent regulations for existing plants do not comply with the statutory mandate of Section 304(b). If the Court

recognizes pendent jurisdiction in the court of appeals to review EPA's guideline regulations, the decision of the court of appeals in *du Pont II* respecting the nature and content of the guideline regulations should be reversed and remanded. If pendent jurisdiction is not recognized by this Court, the decision of the court of appeals in *du Pont II* as to the guideline regulations should be reversed such that further proceedings would be had in the district court.

Respectfully submitted,

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